IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated:- 20.03.2007

Coram:-

The Hon'ble Mr. Justice P.SATHASIVAM
and
The Hon'ble Mr. Justice N.PAUL VASANTHAKUMAR

Writ Petition No.49821 of 2006,
Review Application Nos.5 & 7 of 2007
and
W.P.M.P. Nos.219 of 2007 and M.Ps. 1 & 2 of 2006
and 1 & 2 of 2007

W.P. No.49821 of 2006

Hutchison Essar South Limited,
Represented by its Manager-Legal
Rajesh Shankar,
222 TTK Road, Alwarpet,
Chennai 600 018. ... Petitioner

vs.

1. The Chairman,
Chennai Metropolitan Development
Authority,
Thalamuthu Natarajan Building,
Gandi Irwin Road,
Egmore, Chennai-600 008.

2. The Commissioner,
Corporation of Chennai,
Rippon Building,
Chennai-600 003.

3. Green Gardens Association,
represented by its Secretary,
P.Palanivel,
No.388/2, green Gardens,
L Block, Anna Nagar East,
Chennai-600 102.

4. Dr.Munirathinam ... Respondents

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Review Application Nos.5 & 7/2007:-

Hutchison Essar South Limited,
Represented by its Manager-Legal
Rajesh Shankar,
222 TTK Road, Alwarpet,
Chennai-600 018. ... Petitioner in Review Petition No.5 of 2007.

M/s. Reliance Communications Ltd.,
Reliance House No.6,
Haddows Road, Nungambakkam,
Chennai-600 006. ... Petitioner in Review Petition No.7 of 2007.

vs.

1. Green Garden Association,
Rep. by its Secretary
P.Palanivel, No.388/2,
green Gardens, "L" Block,
Anna Nagar East,
Chennai-600 102.

2. The Commissioner,
Corporation of Chennai,
Rippon Building,
Chennai-600 003.

3. The Chairman,
Chennai Metropolitan Development Authority,
Thalamuthu Natarajan Building,
Gandhi Irwin Road,
Egmore,
Chennai-600 008.

4. Dr.Munirathinam ... Respondents in both Rev. Applications

Writ Petition No.49821 of 2006, filed under Article 226 of the Constitution of India for the issuance of a writ of certiorari to call for the records / proceedings relating to Letter No.EN1/18297/2006, dated 15.12.2006, on the file of the first respondent and quash the same.

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Review Petition Nos.5 and 7 of 2007, filed under Order 47 Rule 1 read with Section 114 CPC, against the orders, dated 21.09.2006 passed in W.P. No.36084 of 2005 which was subsequent clarified as per the order dated 26.10.2006 passed in W.P.M.P. No.18230 of 2006.

The Writ Petition filed under Article 226 of the Constitution of India praying that this court may be pleased to issue a writ of mandamus directing the 1st and 2nd respondents to initiate action under Section 56 and 57 of the Tamil Nadu Town and Country Planning Act, 1971 and under Section 256 of the Chennai City Municipal Corporation Act and thereby demolish the offending illegal construction and remove the deviations which have been put up in violation of the sanctioned plan and the 2 giant towers at the 3rd respondent building at No.'L', 21, 26th Street, 'L' Block, Anna Nagar East, Chennai-600 102. (WP.36084) In the Writ Miseallaneous Petition the petitioner prayed that for the reasons stated in the affidavit filed therein the High Court will be pleased to order permitting the petitioner's Association to seek clarification on the orders passed by this Hon'ble Court in the above Writ Petition No. 36084 of 2005 dated 21.9.2006 (WPMP.18230 of 2006)

Mr.R.Muthukumarasamy, Senior Counsel for Mr.Shivakumar for petitioner in W.P. and Review Petition No.5/07.

Mr.S.Raghunathan, for petitioner in Rev. Application No.7 of 2007.

Mr.J.Ravindran, for C.M.D.A. in W.P. and Rev. Application Nos.5 & 7/2007.

Mr.A.Mohamed Ghouse, for Corporation in W.P. No.49821 of 2006.

Mr.L.N.Prakasam, for Corporation in Rev. Application Nos.5 & 7 of 2007.

Mr.T.K.Kulasekaran, for R3 in WP No. 49821 of 2006 and for R1 in both Review Applications.

Mr.R.Subramanian, Senior Counsel for Mr.A.Suresh for R4 in W.P and both Rev. Applications.

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COMMON JUDGMENT

(Judgment of the Court, delivered by P.SATHASIVAM, J.)

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Since the issue in all these matters is one and the same, they are being disposed of by the following Common Order.

2. Green Gardens Association, through its Secretary P.Palanivel, filed W.P. No.36084 of 2005, praying to issue a writ of mandamus directing the 1st and 2nd respondents therein to initiate action under Sections-56 and 57 of the Tamil Nadu Town and Country Planning Act, 1971, and under Section-256 of the Chennai City Municipal Corporation Act and thereby demolish the offending illegal construction and remove the deviations which have been put up in violation of the sanctioned plan and the 2 giant towers erected in the 3rd respondent's building at No.L-21, 26th Street, L Block, Anna Nagar East, Chennai-102. By Order dated 21.09.2006, a Division Bench of this Court, after hearing the counsel for the petitioner and respondents-1 and 2; without reference to the factual details and the stand of official respondents-1 and 2 as well as contesting 3rd respondent, directed respondents-1 and 2 to take all effective steps to remove the unauthorised erection of two giant towers of the Private Telecom Companies, after giving notice to the 3rd respondent therein viz., Dr.V.Munirathinam, within a period of four weeks from the date of receipt of copy of the said order. It is relevant to mention that though the 3rd respondent was served notice and counsel had entered appearance, none appeared on his behalf when the matter came up for hearing before the Bench.

3. The very same petitioner / Secretary of Green Gardens Association filed Miscellaneous Petition viz., WPMP No.18230 of 2006 in W.P. No.36084 of 2005, seeking clarification of the orders passed on 21.09.2006. While hearing the said petition, all the respondents including the owner of the Building were represented by counsel. By order, dated 26.10.2006, the Division Bench directed official respondents-1 and 2 to take all effective steps to initiate action under Sections 56 and 57 of the Town and Country Planning Act and under Section 256 of the Chennai City Municipal Corporation Act in respect of the illegal construction and demolish the same as well as remove deviation if any made by the 3rd respondent therein. In the same order, the Division Bench also directed them to remove the unauthorised erection of two giant towers of the private telecom companies in accordance with law after statutory notice and to complete such exercise within a period of four weeks from the date of receipt of copy of the order.

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4. Aggrieved by the order dated 21.09.2006 in W.P. No.36084 of 2005 and the clarification order dated 26.10.2006 in W.P.M.P. No.18230 of 2006 in W.P. No.36084 of 2005, the said two Telecom Companies, viz., Hutchison Essar South Limited and Reliance Communications Limited, who were not parties before the Division Bench, have filed Review Application Nos.5 and 7 of 2007 respectively.

5. Consequent to the directions in the orders dated 21.09.2006 and 26.10.2006, the Member-Secretary, Chennai Metropolitan Development Authority (C.M.D.A.), sent a letter dated 15.12.2006 to the owner of the Building Dr.V.Munirathinam, requesting him to remove the two giant towers of the private telecom companies at Door No.L-18, Plot No.503, 26th Street, Anna Nagar, Chennai-102, within 10 days from the date of receipt of the said letter. The letter also indicated that, failing compliance, the CMDA would take necessary steps to remove the same without any further notice. Questioning the said order, Hutchison Essar South Limited has filed W.P. No.49821 of 2006.

6. Heard Mr.R.Muthukukmarasamy, learned Senior Counsel for petitioner in W.P. and Review Application No.5 of 2007; Mr.S.Raghunathan, learned counsel for the petitioner in Review Application No.7 of 2007; Mr.J.Ravindran, learned counsel for the CMDA; Mr.A.Mohamed Ghouse & L.N.Prakasam, learned counsels for the Corporation; Mr.T.K.Kulasekaran for Green Gardens Association; and Mr.R.Subramanian, learned Senior Counsel for the owner of the building - Dr.V.Munirathinam.

7. The following points arise for consideration:-

(a) Whether the Review Petitions, filed by the private telecom companies, who were not parties to the W.P. and W.P.M.P., are maintainable?

(b) Whether the order, directing the official respondents to take action against the owner of the building, in that, to demolish and remove the giant towers, is warranted?

8. It is not in dispute that Dr.V.Munirathinam is the owner of the land and building at Old No.L-8, New No.L-18, 26th Street, Anna Nagar, Chennai-102. According to him, the property was allotted in his favour by the Tamil Nadu Housing Board in the year 1962. He applied for sanction of Building Plan from Corporation of Chennai and the same was approved for ground floor on 04.08.1972 in B.A. No.1812. Subsequently, he applied for additional extension of the building for 1st and 2nd floors and the same was sanctioned by

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C.M.D.A. on 23.08.1988 in B.A. No.610 of 1988. He completed the construction of 1st and 2nd floors in 1988-89. Thereafter, he applied for addition in ground floor and also for relaxation, which was sanctioned by CMDA in PPA No.6160 of 1990, dated 17.09.1990. It is also his case that the 3rd floor construction was started in 1994 and the same was completed as early as in 1997. He also extended ground floor car parking area, 1st and 2nd floor, single bed room above the car parking and all the constructions were completed in 1997. The total area of the building after constructions is 9200 sq. ft. According to him, the entire building including 3rd floor constructions and extensions were subjected to property tax assessment from the assessment year 1998-1999 and the order was issued on 14.09.2000. With respect to the above additions, he filed application for regularisation and also paid the regularisation fee on 26.06.2002 and scrutiny fee on 29.06.2002. According to him, inasmuch as his construction was over in 1997, his application for regularisation is in terms of the judgment passed by the Division Bench of this Court reported in 2006 (4) CTC 483. It is also his claim that the installation of Cellular Tower is as per Rules and Regulations and there is no violation of any building regulations.

9. No doubt, though the owner of the building engaged a counsel to represent him before Court in W.P. No.36084 of 2005, the fact remains that none appeared for him when the court passed orders on 21.09.2006. As observed earlier, except referring to the prayer in the writ petition and the miscellaneous petition, in the orders passed, absolutely there is no discussion as to the stand of the Corporation and CMDA as well as the owner of the building in question. No doubt, direction was issued to issue notice to the owner of the building before taking any action. Likewise, there was a positive direction for removal of two cellular towers in the 2nd and 3rd floors of the building. Unfortunately, no information was either gathered or furnished to the court about the ownership of the two towers and no attempt was made to find out as to whether permission or licence was granted by competent authorities for erection of the same. Though an objection was raised as to the maintainability of the Review Petition filed by the private telecom companies, it is not in dispute that, if there is an error apparent on the face of the record, the Order or Judgment is vitiated and the Court can interfere with the same in the Review to remove the error and to avoid miscarriage of justice. In this regard, it is useful to refer to the Division Bench decision of this court reported in 1995 Writ Law Reporter 892 (Baskaran v. The Commissioner of College Education), wherein, the Bench, after referring to various decisions of the Supreme Court and this Court, formulated the following principles,

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" 26. The following principles can be culled out from the above rulings:-

1) If the judgment is vitiated by an error apparent on the face of the record in the sense that it is evident on a mere looking at the record without any long-drawn process of reasoning, a review application is maintainable.

2) If there is a serious irregularity in the proceeding, such as violation of the principles of natural justice, a review application can be entertained.

3) If a mistake is committed by an erroneous assumption of a fact which if allowed to stand, would cause miscarriage of justice, then also an application for review can be entertained.

It is not necessary to point out that the above principles are applicable de hors the provisions of Order XLVII, Rule 1 of the Code of Civil Procedure." (Emphasis supplied)

10. Now let us consider as to whether the Review Petitioners have made out a case for interference in terms of the above principles.

11. As observed earlier, even though the owner of the building engaged a counsel, admittedly, none represented him. In a matter like this, where the allegation relates to unauthorised construction and violation of Plan etc., it is but proper to afford adequate opportunity to all the parties. It is made clear that we are not justifying the absence of the counsel who filed vakalat for the owner of the building. One more opportunity could have been afforded to avoid further litigation. It is the claim of the Review Petitioners that, only after getting licences from various authorities and satisfying all conditions including structure etc., they installed the towers both in the II and III floors. In such circumstances, we are of the view that they should have been issued notice and heard on their claims before passing any order to take action against them. Unfortunately, such a recourse was not adopted while ordering removal of the two towers. Inasmuch as the Review Petitioners have established that they were not heard and afforded with opportunity, the review applications can be entertained on the ground of violation of the principles of natural justice. We have already referred to the claim of the review petitioners that they obtained permission/licence from all the concerned authorities; in such circumstances, it is evident on a mere looking at the record that an error has been committed in not affording opportunity to them to put forth their case.

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12. Though in the Report filed by the Assistant Executive Engineer, Division No.67 of Corporation of Chennai, it is stated that M/s.Reliance Communication Limited has erected BTS Towers in the 2nd floor unauthorisedly; Mr.R.Muthukumarasamy, learned Senior Counsel, has brought to our notice that, when M/s. Reliance Infocom approached the Commissioner, Corporation of Chennai, through their letter dated 10.11.2001, it was informed to them that no prior permission is required. In the letter dated 16.11.2001, the Commissioner, Corporation of Chennai, communicated as follows:-

> " Sir,
>
> This is with reference to your letter No.2097:2001-2002 dt. 10th November 2001.
>
> At Present the Chennai Corporation is not having any licensing system for setting up of BTS Towers. Therefore, no prior permission from Chennai Corporation is required for this purpose.
>
> In case the Chennai Corporation introduces the licensing system in such activity in future, you may have to comply with the requirements accordingly.
>
> Yours faithfully,
> Sd/-
> (J.T.Acharyulu)"

Such being the position, as seen from the communication/reply given by the Highest Officer of the Corporation to the Telecom Company, the stand taken by the Assistant Executive Engineer cannot be accepted.

13-A. Coming to various orders by the Government of Tamil Nadu, Department of Telecommunications/I.T., it is brought to our notice that, in G.O. Ms. No.2, I.T. Department, dated 01.04.2002, it is provided that,

> " 4. Accordingly, the Government hereby accord permission to any licenced telecom company and which is committed to the cause of Government of Tamil Nadu to install its Base Stations consisting of Tower, Equipment room and Generator room, on roof top or on the ground of premises and buildings belonging to Government of Tamil Nadu, subject to availability and technical feasibility, on a non-execlusive basis and also subject to the following terms and conditions:
>
> .....
> .....
> .....

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(xi) Exemption shall be given to the telecom companies from side set back rules of Chennai Metropolitan Development Authority/Directorate of town and Country Planning for the BTS Towers and the said rules shall be applicable only to the construction of buildings. "

13-B. In G.O.(Ms.) No.302, Housing and Urban Development (UD A-2) Department, dated 12.12.2002, after accepting the proposal of the Special Commissioner of Town and Country Planning, the Government permitted the installation of Base Trans receiver station Towers in all the land use zones in the master plan.

13-C. In G.O. (Ms.) No.177, Municipal Administration & Water Supply (MAI) Department, dated 17.12.2002, the Government granted exemption to BTS Towers constructed by Telecom Companies from the Tamil Nadu District Municipalities Building Rules, 1972, and Multistoreyed and Public Building Rules, 1973, subject to fulfilling certain conditions.

13-D. Letter dated 26.11.2005 from ARAI (The Automative Research Association of India) issued to M/s.Kirloskar Oil Engines Limited, shows that proper approval for installation of gensets was obtained. Letter dated 12.07.2006 from from Wireless Planning and Co-ordination Wing, Department of Telecommunications, Government of India (SACFA Clearance Certificate), which is available at page No.56 of the typed-set filed in Review Petition No.5 of 2007, shows that, on satisfying all the conditions, clearance certificate has been issued. The information available at page No.57 of the typed-set, which is an extract of the answer given by the Ministry of Communications and Information Technology, dated 27.7.2006, shows that there is no enough evidence to show direct health hazards of RF exposures from Mobile Phone Base Stations (Towers). The above information was stated by the Minister of State for Communications & Information Technology, Dr.Shakeel Ahmad, in the Rajya Sabha, in a written reply to a question by Ms.Anusuiya Uikey on the subject.

13-E. The document available at page No.58 of the same typed-set of papers, which is a Certificate dated 04.12.2006, shows that 3m + 15m tower on rooftop made at No.18, 26th Street, Anna Nagar, Chennai-600 102, for Hutchison Essar South Limited (CHN-313) is designed as per the relevant IS Standards and is stable and safe. Thus, it is clear that Hutchison Essar South Limited has obtained structural stability certificate from the concerned Engineer (Jayam Consultants Privt Limited).

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14. All the above particulars clearly show that the Review Petitioners obtained orders/licences/permission from various authorities. The Government of Tamil Nadu also issued orders, granting exemption from certain rules of Chennai Metropolitan Development Authority / Directorate of Town and Country Planning. Further, structural stability Certificate was issued by the competent authority. Inasmuch as the Review Petitioners were not impleaded as parties to W.P. No.36084 of 2005, they were deprived of the opportunity to place all the above mentioned relevant materials before this court. We have already referred to the fact that there is no dispute as to the construction of building viz., ground floor, first floor and second floor. Though the Corporation has pointed out that there is one violation in respect of set back in the II Floor, in view of the above referred Government Orders, the same cannot be termed as a gross violation insofar as the installation of tower at the II Floor.

15. Coming to the issue relating to III Floor, it is the case of the building owner Dr.V.Munirathinam that he completed even the III floor prior to the cut off date viz., 28.2.1999, prescribed by the Division Bench and that the property was subjected to property tax for the year 1998-1999. He enclosed copy of the property tax assessment for 1998-99 in the typed-set filed in W.P No.36084 of 2005. It is also brought to our notice that as against the order of refusal by the Member Secretary, C.M.D.A., in letter No.REG.II/B5(2)/35002/03, dated 20.11.2006, received by him on 28.11.2006, the owner of the building preferred an appeal to the Government, Housing and Urban Development Department, seeking to regularize his building as soon as possible. In view of the above factual details, we are also of the view that the tower installed in the III Floor also cannot be faulted with till final decision is taken by the Government. The Review Petitioners and Writ Petitioner in W.P. No.49821 of 2006 have made out a case for review / interference.

16. Accordingly, the respondents viz., Commissioner, Corporation of Chennai, and Member Secretary, CMDA, are not permitted to interfere with the tower in the II Floor of the building in question. Insofar as the tower in the III floor, subject to the order of the Government in the Appeal filed by the owner of the building Dr.V.Munirathinam, the authorities are free to pass appropriate orders. Considering safety of the neighbouring residents, the official respondents are free to inspect the premises and pass appropriate order after notice to them. If any scheme is evolved by the Corporation/CMDA, governing the BTS giant towers/building wherein they are erected, towards safety measures or keeping in view the scientific aspects/data, such scheme shall be communicated to the owner of the building as well as the Telecom companies so as to comply with the requirements at once.

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17. In the result, W.P. No.49821 of 2006 as well as Review Application Nos.5 & 7 of 2007 are allowed to the extent mentioned above. No costs. All connected Miscellaneous Petitions are closed.

JI.

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1. The Chairman, Chennai Metropolitan Development Authority, Thalamuthu Natarajan Building, Gandi Irwin Road, Egmore, Chennai-600 008.

2. The Commissioner, Corporation of Chennai, Rippon Building, Chennai-600 003.

+ 1 cc to M/s. Shivakumar & Suresh, Advocate, SR No.17314

+ 1 cc to Mr. J.Ravindran, Advocate, SR No.17451

+ 1 cc to Mr. L. N. Praghasam, Advocate, SR No.17162

+ 1 cc to Mr. A. Suresh, Advocate, SR No.17139

+ 1 cc to Mr. A. Mohammed Ghouse, Advocate, SR No.17003
SC for Corporation of Chennai,

+ 2 ccs to Mr.S. Raghunathan, Advocate, SR No.17322, 17183

+ 3 ccs to Mr. T. K. Kulasekaran, Advocate, SR No.17191-93

Judgment in
W.P. No.49821 of 2006, Rev. Petition Nos.5 and 7/2007 & connected Misc. Petitions.

RS(CO)
SR/29.3.2007

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